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FEDERAL EMPLOYERS' LIABILITY ACT COMPARATIVE NEGLIGENCE.

The Federal Employers' Liability Act section 3, Act April 22, 1908 (Chapter 149, 35 U. S. Stat. 65 [U. S. Comp. St. § 8659]) which provided "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé," may be said to have adopted the rule which authorizes the negligence of the parties to be compared, not for the purpose of wholly relieving either party or both of negligence, but with the effect of reducing the amount of plaintiff's damages according to the extent to which his own negligence has contributed to the injury, rather than the rule that if plaintiff be guilty of negligence contributing to the injury, he cannot recover, unless defendant's negligence is gross in comparison with his own. The purpose of this provision of the act was to abrogate the common-law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee, and means that, where the casual negligence is partly attributable to the plaintiff partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. Norfolk & Western Ry. Co. *v.* Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654 (57 L. Ed. 1096, Ann. Cas. 1914C, 172. See Second Employers' Liability Cases, 223 U. S. 1, 50 [32 S. Ct. 169, 56 L. Ed. 327, 3 L. R. A. (N. S.) 44]).

In Grand Trunk Western Ry. Co. *v.* Lindsay, 223 U. S. 42, 47, 34 Sup. Ct. 581, 582 (58 L. Ed. 838, Ann. Cas. 1914C, 168), the court lays down the doctrine that if, under the Employers'

Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, where he could not be defeated by calling his act contributory negligence; for his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act. A recovery is not prevented in a case of contributory negligence, since the statute substitutes for it a system of comparative negligence whereby the damages are to be diminished in the proportion which his [plaintiff's] negligence bears to the combined negligence of himself and the carrier; in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employé.

The sole and only object of this provision is, on the one hand to exclude from the recovery a proportional part of the damages corresponding to the employé's contribution to the total negligence. While on the other hand it substitutes for the contributory negligence rule a doctrine of comparative negligence which does not go to the right of action. It means, and can only mean, that, where the casual negligence is attributable partly to the carrier and partly to the injured employé, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both. Seaboard Air Line *v.* Tilghman, 237 U. S. 499, 501, 35 Sup. Ct. 653, 654 (59 L. Ed. 1069).

From the foregoing consideration we see that the design of the statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which

one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is if it should be found that both parties were to blame, that both were negligent, then the defendant is to be responsible to the extent to which it was to blame, and the plaintiff would be responsible himself to the extent to which he was to blame.

In regard to the proportioning according to the negligence of the respective parties it may be said that the statute quoted at the outset provides a rule for determining the amount of the deduction required to be made. And from the statute it seems that the proper manner of ascertaining the proportion is to contrast the negligence of the employé with the total casual negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery.

It seems therefore that the matter of diminishing the damages should not be committed to the jury without naming any standard to which their action should conform other than their own conception of what is reasonable, for in so doing the court fails to give the proper effect to that part of the act which we are considering.

Hence in cases of this character, where the evidence justifies a finding that both defendant and plaintiff were guilty of negligence contributing to the accident, the jury should be carefully instructed concerning the rule of comparative negligence established by the federal statute. It is the duty of the jury first to determine whether or not the defendant was guilty of casual negligence; for, if that issue is determined against the plaintiff, there can be no recovery. If the issue of the defendant's negligence is determined in favor of the plaintiff, then the jury should consider whether or not he, too, was guilty of negligence directly contributing to the happening of the accident, and, if they decide that issue against the plaintiff, then, looking at the combined negligence of the plaintiff and defendant as a whole, and using their best judgment based on the evidence before them, the next material subject for the jury to consider is in what ratio should this combined negligence be distributed between the parties to the accident; in other words, how much, or what proportion, of the whole blame, or fault, should be attributed to

each.[1] After this problem is solved, the jury must determine the amount of the damages suffered through the combined negligence, and deduct therefrom a proportion corresponding with the share of negligence charged by them against the plaintiff, the balance, or a proportion corresponding with the share of negligence charged against the defendant, to be awarded as damages to the plaintiff (Waina *v.* Pennsylvania Co., 96 Atl. 461). The method just outlined is not the only way in which a jury may proceed to reach its conclusions in the trial of causes involving comparative negligence, but it seems to be an orderly manner for considering and determining such cases.

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1. Thus it is error in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), to instruct the jury that if the injured employee was negligent "a comparative amount, depending upon the ratio of his negligence to the negligence of defendant," should be considered by the jury, and that the jury should "take into consideration his negligence in comparison with the negligence of the defendant." However such error may be cured by subsequent portions of the charge. Ill. Cent. R. Co. *v.* Skaggs, 36 Sup. Ct. R. 249.